STATE OF MICHIGAN

COURT OF APPEALS

REZA BAYATI,

Plaintiff-Appellant,

v

BAHAREH BAYATI, a/k/a BAHAREH BAHIR-HOSSEINI BAYATI,

Defendant-Appellee.

UNPUBLISHED
May 31, 2005

No. 258378
Oakland Circuit Court
Family Division
LC No. 2003-678242-DM

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right an order modifying his parenting time with his two minor children who live in California. We reverse and remand.

This case is before us for a second time. As a result of the first appeal, the custody order awarding defendant sole physical custody and allowing her to remove the children to California was vacated on the ground that the trial court did not independently consider the best interests of the children. *Bayati v Bayati*, 264 Mich App 595, 597; 691 NW2d 812 (2004). This Court remanded the matter back to the same trial judge for a hearing de novo on the custody issue but, to date, this hearing has not been conducted and defendant has retained custody of the children in California.

In that same custody order, plaintiff was granted parenting time of alternate weeks from Friday afternoon through the following Thursday morning to be exercised in California, although he lives and has a medical practice in Michigan. Plaintiff moved to change the parenting time ordered because it was unworkable and not practical for him to exercise in light of the fact that the children were in California. The matter was heard by a referee. No record of the proceeding was made. At the subsequent circuit court hearing, plaintiff argued that the agreement reached was that he would be allowed to bring the children to Michigan for one week a month and that the second week of parenting time would remain in California. Defendant contended, and the referee agreed, that the agreement was that plaintiff would have the children one week per month in Michigan only. Adopting defense counsel's argument, the trial court entered an order modifying plaintiff's parenting time from alternate weeks in California to one week per month in Michigan from Saturday to Saturday, with plaintiff personally flying to California to pick the children up and return them. Plaintiff's motion for reconsideration, on the ground that an

evidentiary hearing should have been held before his parenting time schedule was modified, was denied. Plaintiff appeals.

Plaintiff argues that the trial court should have conducted an evidentiary hearing to consider the best interests of the children, as well as to determine whether he had an established custodial environment that would be impacted, before modifying his parenting time. After de novo review, we agree and conclude that the trial court abused its discretion and committed clear legal error when it failed to conduct an evidentiary hearing or make findings of fact regarding the best interests of the children and the custodial environment(s) before modification of the ordered parenting time. See MCL 722.28; *Terry v Affum (On Remand)*, 237 Mich App 522, 537; 603 NW2d 788 (1999).

The controlling factor in determining parenting time is the best interests of the child. MCL 722.27a; *Deal v Deal*, 197 Mich App 739, 742; 496 NW2d 403 (1993). "The term 'best interests of the child' is specifically defined in the statute as a conclusion based on the court's evaluation and determination of enumerated factors," set forth at MCL 722.23. *Terry*, *supra*. Before deciding a parenting time dispute the court must, at a minimum, evaluate the best interest factors that relate to the contested issues. See *Hoffman v Hoffman*, 119 Mich App 79, 83; 326 NW2d 136 (1982). A trial court errs when it modifies parenting time rights without conducting an evidentiary hearing and making findings of fact in support of the modification. *Terry*, *supra* at 535, 537; *Bivins v Bivins*, 146 Mich App 223, 234; 379 NW2d 431 (1985). Further, a trial court's best interests findings cannot be made implicitly. *Brown v Loveman*, 260 Mich App 576, 597; 680 NW2d 432 (2004). And when such modification amounts to a change in the custodial environment, the trial court should apply the standard used for a change in custody—clear and convincing evidence that the change would be in the best interests of the child. *Id*. at 597-598. "Whether an established custodial environment exists is a question of fact that the trial court must address before it makes a determination regarding the child's best interests." *Mogle v Scriver*, 241 Mich App 192, 197; 614 NW2d 696 (2000).

Here, the trial court did not admit any evidence, hear any testimony, evaluate the best interests of the children, consider the established custodial environment, or make any findings of fact before it ordered a modification of parenting time that reduced plaintiff's parenting time by one half. Accordingly, we vacate this modification order and remand this case to the trial court for the appropriate hearing. As noted above, a de novo hearing on the custody issue has already been ordered by this Court as a result of plaintiff's prior appeal, but the trial court has not followed our directive. Accordingly, the hearing on the matters of custody and parenting time is to be held by the trial court within twenty-one days of the issuance of this opinion, the trial court is to render its opinion on the issues within fourteen days of the hearing, and the trial court is to forward its findings and transcript of the hearing to this Court within fifty-six days of the release of this opinion. We will retain jurisdiction over this matter.

Next, plaintiff argues that the trial judge and referee should be disqualified because of demonstrated bias and prejudice against plaintiff. After review of the lower court's factual findings and conclusions for an abuse of discretion, and de novo review of the applicable facts to the law, we disagree. See *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 728; 591 NW2d 676 (1998).

MCR 2.003(B)(1) provides for disqualification where a "judge is personally biased or prejudiced for or against a party or attorney." See, also, *Armstrong v Ypsilanti Township*, 248 Mich App 573, 596-597; 640 NW2d 321 (2001). The challenging party must overcome a heavy presumption of judicial impartiality and show actual personal bias or prejudice. *Cain v Dep't of Corrections*, 451 Mich 470, 495, 497; 548 NW2d 210 (1996). Opinions formed during the course of the proceedings and critical comments directed at the parties do not usually constitute bias or partiality unless there is a deep-seated favoritism or antagonism causing the exercise of fair judgment to be impossible. See *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). An adverse ruling alone is not sufficient to disqualify a judge. See *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003).

Here, plaintiff argues that negative comments made by the trial judge and adverse rulings evidence impermissible bias or prejudice. After a review of the record, we disagree. The trial court's insistence that plaintiff name an internet service only illustrates the court's attempt to resolve an issue, that it had previously addressed, by providing for a specific detail necessitated by the parties' inability to resolve the issue themselves. The trial court's other comment, considered in context, exhibits the trial court's attempt to encourage the parties to resolve their several contentious disputes more amicably for the benefit of the children. Although these comments were directed toward plaintiff, they do not reveal a deep-seated favoritism or antagonism toward plaintiff. See *Wells*, *supra*. Further, the adverse rulings against plaintiff do not establish grounds for disqualification. See *Gates*, *supra*. In sum, plaintiff has not overcome the presumption of judicial impartiality.

Additionally, plaintiff argues that a new referee should be assigned because of the referee's alleged negative view of plaintiff. At the July 2004 hearing, defendant argued that plaintiff had failed to comply with a prior order to provide verification of certain support payments and paid bills. Plaintiff takes issue with the following comments made by the referee to the trial court:

> With regard to the documents [plaintiff] was supposed to present, he didn't. And, it was very clear of what went on that morning. I said that you have to show us documentation and do it within seven days. And, in fact, I asked him because he was supposed to go to California that week. I said can you do it in seven days and he said, "Sure." We haven't seen a document yet. All we seen was a handwritten whatever he put together. [Plaintiff] has historically been like this. You know, he gives you want he wants, when he wants, if he wants. And, it's been a problem throughout the entire case. And, that's one of the reason [sic] that it has caused him, in the long run, so much aggravation and so much harm. His credibility's damaged, and it's cost him extra money. And he just hasn't changed.

The referee's comments simply report plaintiff's prior action to the trial court to assist the court in its disposition of defendant's motion. The referee's assessment of plaintiff's credibility is apparently based on plaintiff's own prior actions and disregard for the trial court's prior orders. Such a comment alone, which is based on plaintiff's actions during the course of the proceeding, does not indicate bias or prejudice warranting disqualification. See *Wells*, *supra*. Accordingly, plaintiff has failed to demonstrate the requisite bias or prejudice for disqualification of the referee.

In light of our reversal of the trial court's order modifying plaintiff's parenting time, we need not address his other challenges to the order.

Affirmed in part, reversed in part, and remanded to the trial court for proceedings consistent with this opinion. We retain jurisdiction and instruct the trial court to conduct a hearing on the matters of custody and parenting time within 21 days of the issuance of this opinion, render its opinion on the issues within 14 days of the hearing, and forward its findings and a transcript of the hearing to this Court within 56 days of the release of this opinion.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin